No. 528

Supreme Court of the United States

OCTOBER TERM, 1942

O. L. HASTINGS, ET AL., *Petitioners*,

vs.

SELBY OIL & GAS COMPANY, ET AL.,
Respondents

RESPONDENTS' REPLY: (1) to "ADDITIONAL ARGUMENT ON BEHALF OF PETITIONERS O. L. HASTINGS AND C. F. DODSON," submitted on re-argument of the cause; and (2) to "DISCUSSION OF QUESTIONS OF THE COURT SUBMITTED IN ITS ORDER RESTORING CASES TO THE DOCKET FOR RE-ARGUMENT," filed on behalf of the Railroad Commission and G. E. Burford, et al.

E. R. HASTINGS,
Tulsa, Oklahoma,
DAN MOODY,
Austin, Texas,
Attorneys for Respondents.

INDEX

	Pages
Statement	1
Reply to argument on behalf of O. L. Hastings and C. F. Dodson	2
Reply to discussion of Questions of the Court submitted in its order restoring cases to the docket for re-argument, filed by the Railroad Commission and G. E. Burford, et al.	7
(1) That Section 8 of Article 6049c, in providing that, "any interested person affected" by an order of the Railroad Commission, and "who may be dissatisfied therewith" may bring suit challenging the validity of such order, does not contemplate that the person bringing the suit shall show as a basis of his right to sue that he has been or will be injured by the order	8, 9
(2) That in a suit under Section 8 of Article 6049c to cancel an order of the Railroad Commission granting a well permit, the person to whom the permit has been granted is not a necessary party to the suit	8, 17
(3) That Section 8 of Article 6049c provides procedural rights and does not affect substantive rights of the parties	8, 20
In view of recent decisions of the Texas Courts, are there Grounds in this case similar to those existing in Railroad Commission vs. Rowan & Nichols Oil Company, 311 U. S. 614, 615, which make it appropriate for the District Court to decline jurisdiction of the cause?	22
Conclusion	25

AUTHORITIES

	Pages
Abrahams vs. Vollbaum, 54 Tex. 226	19
Alpha Petroleum Company vs. Terrell, 122 Tex. 257, 59 S. W. (2d) 364	20, 21
Basham vs. Holcombe, 240 S. W. 619	19
City of Dallas vs. Couchman, 249 S. W. 234	19
Dwyer vs. Hackworth, 57 Tex. 245	19
Empire Gas & Fuel Company vs. Railroad Commission of Texas, et al., 94 S. W. (2d) 1240, (error refused	11
Gulf Land Company, et al., vs. Atlantic Refining Company, 134 Tex. 59, 131 S. W. (2d) 73	21, 22
Holt & Co. vs. Wheeler County, 235 S. W. 226	19
Magnolia Petroleum Company vs. Railroad Commission, et al., 128 Tex. 189, 96 S. W. (2d) 273	21
Magnolia Petroleum Company, et al., vs. Edgar, 62 S. W. (2d) 359	17
Matagorda Canal Company vs. Markham Irr. Co., 154 S. W. 1176	19
Murphy, et al., vs. Turman Oil Company, 97 S. W. (2d) 485	15
North Texas Coach Company vs. Morten, 92 S. W. (2d) 263	19
Railroad Commission, et al., vs. Gulf Production Company, 115 S. W. (2d) 505; affirmed, 134 Tex. 122, 132 S. W. (2d) 254	12
Railroad Commission vs. H. & T. C. R. Co., 90 Tex. 340, 38 S. W. 750	20, 21
Railroad Commission vs. Pullman Company, 312 U. S. 496	3, 8, 23
Railroad Commission of Texas, et al., vs. Rau, 45 S. W. (2d) 413	19
Railroad Commission vs. Rowan & Nichols Oil Co., 310 U. S. 573	4, 5, 6
Railroad Commission vs. Rowan & Nichols Oil Company, 311 U. S. 614	3, 7, 23, 24
Railroad Commission vs. Shell Oil Co., Inc., et al., 139 Tex. 66, 161 S. W. (2d) 1022	6, 15, 21, 22

	Pages
Railroad Commission vs. Shell Oil Company, Inc., 165 S. W. (2d) 503	9, 10
Reynolds, et al., vs. Ward Oil Corp., et al., 157 S. W. (2d) 457	19
Selby Oil & Gas Co., et al., vs. Railroad Commission of Texas, et al., 128 Fed. (2d) 334	4, 5
Smith County Oil & Gas Company, et al., vs. Humble Oil & Refining Company, 112 S. W. (2d) 220 (writ dismissed)	14
Spear, et al., vs. Humble Oil & Refining Company, 139 S. W. (2d) 212	9, 10
Stanolind Oil & Gas Company vs. Midas Oil Company, et al., 123 S. W. (2d) 911 (error dimissed, correct judgment)	13
Turman Oil Company vs. Roberts, et al., 96 S. W. (2d) 724	19
Rule 52, Rules of Civil Procedure	4
64 Corpus Juris 380	5
Section 8, Article 6049c, Vernon's Texas Civil Statutes, 1925	3, 7, 8, 9, 11, 17, 20, 21
Sections 10 and 11, Article 6049c, Vernon's Texas Civil Statutes, 1925	20
Article III, Section 2, Clause 1, Constitution of the United States	2, 7, 8
Webster's International Dictionary	9

No. 528

Supreme Court of the United States

OCTOBER TERM, 1942

O. L. HASTINGS, ET AL., *Petitioners*,

VS.

SELBY OIL & GAS COMPANY, ET AL.,
Respondents

RESPONDENTS' REPLY: (1) to "ADDITIONAL ARGUMENT ON BEHALF OF PETITIONERS O. L. HASTINGS AND C. F. DODSON," submitted on re-argument of the cause; and (2) to "DISCUSSION OF QUESTIONS OF THE COURT SUBMITTED IN ITS ORDER RESTORING CASES TO THE DOCKET FOR RE-ARGUMENT," filed on behalf of the Railroad Commission and G. E. Burford, et al.

Respondents were served on April eighth with copies of two arguments which it is assumed will be filed in this cause. One is an additional argument on behalf of Petitioners O. L. Hastings and C. F.

Dodson, signed by Messrs. John Porter and W. Edw. Lee, attorneys for Petitioners Hastings and Dodson. The other is endorsed with the style and number of this case and also with the style and number of the other cases restored to the docket for re-argument: No. 495, *G. E. Burford, et al., Petitioners, vs. Sun Oil Company, et al., Respondents*, and No. 496, *Sun Oil Company, et al., Petitioners, vs. G. E. Burford, et al., Respondents.* The latter mentioned argument is signed by the Attorney General of Texas and Messrs. Simmons and Smullen, Assistants Attorney General of Texas, attorneys for the Railroad Commission, and Messrs. F. L. Kuykendall and James P. Hart, attorneys for G. E. Burford, et al.

It is Respondents' purpose to here reply to both of these arguments.

REPLY TO ARGUMENT ON BEHALF OF O. L. HASTINGS AND C. F. DODSON

Respondents interpret the copy of argument which has been served on Respondents' attorneys by the attorneys for Petitioners Hastings and Dodson as agreeing with Respondents' contentions:

> 1) That this is a case or controversy within the meaning of Article III of the Constitution of the United States;
>
> 2) That the order of the Railroad Commission involved in this suit was promulgated in the exercise of quasi-judicial power; that the suit invokes the jurisdiction of the Court to determine property rights of Respondents and Petitioners Hastings and Dodson, and does not involve

the determination of State governmental policy committed by statute to the State administrative process;

3) That Article 6049c, Vernon's Texas Civil Statutes, in providing that review of the Commission's orders shall be in "a court of competent jurisdiction in Travis County, Texas, and not elsewhere," does not confine that review to a State Court in Travis County, Texas;

4) That there are not present in this case grounds similar to those which existed in *Railroad Commission vs. Pullman Company*, 312 U. S. 496, which would have made it appropriate for the District Court in its discretion to have withheld the exercise of its equity jurisdiction in this case; and,

5) That there are not present in this case grounds similar to those existing in *Railroad Commission vs. Rowan & Nichols Oil Co.*, 311 U. S. 614, 615, which would have made it inappropriate for the District Court to have declined jurisdiction of this cause.

The copies of the argument of Petitioners Hastings and Dodson as served upon Respondents' counsel seem clearly to take the same position on each of the above mentioned questions as is taken by Respondents in their printed argument submitted on re-argument of the cause.

The last subdivision of the argument of Petitioners Hastings and Dodson is devoted to the contention that the case was correctly decided by the Trial

Court. This part of the argument is grounded upon the proposition that the Trial Court actually decided the case on its merits. The Court has not requested additional argument on this subject, and Respondents would not avert to it here except for the fact that it has been raised by Petitioners Hastings and Dodson.

In the original briefs and in oral argument on original submission of the cause, the nature of the Trial Court's ruling and the basis of it were discussed at length. In reply to what Petitioners Hastings and Dodson now have to say on this subject, Respondents refer the Court to pages 101-103 of the Record. It there appears that counsel for Petitioners Hastings and Dodson took the position that the evidence was not sufficient to overcome the *prima facie* validity of the order. (R., 101.) The Trial Court took the position that this Court, in *Railroad Commission vs. Rowan & Nichols Oil Co.*, 310 U. S. 573, (the only decision in either of the *Rowan & Nichols* cases that had been handed down at the time the Trial Court acted), had ruled that the Trial Court should not substitute its judgment for that of the Commission and that because of that decision he could not "substitute my judgment and discetion for theirs and restrain them by injunction." (R., 102-103.) The statements of the Trial Court in announcing his decision reveal the ruling or holding upon which the judgment (R., 49-50) was predicated. The Trial Court did not make or file any findings of fact or conclusions of law required by Rule 52 of the *Rules of Civil Procedure*. The Circuit Court of Appeals in this case *(Selby Oil & Gas Co.*,

et al. vs. Railroad Commission of Texas, et al., 128 Fed. (2d) 334) placed upon the action of the Trial Court and the record thereof the interpretation which Respondents here place upon it.

Even if it be conceded for the purpose of argument that the Trial Court's action was not based upon an interpretation of the *Rowan & Nichols* case, *supra*, respecting the jurisdiction of the Court, but upon the sufficiency of the evidence to show Respondents entitled to the relief sought, the judgment of the Trial Court would nevertheless be erroneous. The Trial Court sustained the motion made by Petitioners Hastings and Dodson for judgment. (R., 102-103.) Petitioners Hastings and Dodson, in effect, had demurred to the evidence. (R., 101-102.) On appellate review of a judgment based on such a motion, the Court will consider the evidence in the light most favorable to the party resisting the motion. The law is stated in 64 *Corpus Juris* 380, as follows:

> * * * "Only that portion of the evidence which tends to prove the case of the demurree can be considered and evidence which tends to break down the case of demurree cannot be considered. In all jurisdictions it is held that the court cannot weigh conflicting evidence on a demurrer thereto, but must take as true every part of it favorable to the party resisting the demurrer which tends to prove his case, and, in most jurisdictions, must treat as withdrawn the evidence favorable to demurrant."

At pages 2 to 5 of the "ARGUMENT FOR RESPONDENTS ON RE-ARGUMENT OF THE CAUSE," there is set out a summary of the testimony introduced on the trial of this cause. It does not overstate the case to say that the evidence was sufficient to show, as a matter of law, that there did not exist at the time the order of the Commission was entered sufficient facts to justify the order; that is, that there did not exist at the time the challenged order was entered sufficient facts to show that the drilling of the proposed well was necessary "to prevent confiscation of property," the basis assigned by the Commission for the order granting the permit to drill. *(Railroad Commission, et al., vs. Shell Oil Co., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030.) However, if the Court should think that such a statement is more than the testimony merits, it cannot be disputed that the testimony was sufficient to raise a fact issue as to whether or not there existed at the time the order was entered sufficient facts to justify the order; and, in the presence of such a fact issue, Petitioners were not entitled to judgment on the motion. It then became the duty of the Trial Court to state findings of facts and conclusions of law, and upon these base a judgment. The Trial Court stated that under the *Rowan & Nichols* case this Court had told the Trial Court "not to substitute its judgment for that of the Commission any more." (R., 102-103.) Such was the basis of the Trial Court's judgment as revealed by what the Trial Court said.

REPLY TO DISCUSSION OF QUESTIONS OF THE COURT SUBMITTED IN ITS ORDER RESTORING CASES TO THE DOCKET FOR REARGUMENT, FILED BY THE RAILROAD COMMISSION AND G. E. BURFORD, ET AL.

In this portion of the argument, replying to the argument filed on behalf of the Railroad Commission of Texas and G. E. Burford, et al., the term "Petitioners" refers to the Railroad Commission of Texas and G. E. Burford.

Petitioners contend:

1) That this suit is not a case or controversy within the meaning of Article III of the Constitution of the United States;

2) That Article 6049c confines jurisdiction of suits brought under it to a State District Court in Travis County, Texas; and,

3) That in view of recent decisions of the Texas Courts, there are in this case grounds similar to those existing in *Railroad Commission vs. Rowan & Nichols Oil Co.*, 311 U. S. 614, 615, which made it appropriate for the District Court to decline jurisdiction of the cause.

Respondents apparently concede:

1) That this suit does not involve determination of State governmental policy committed by statute to State administrative process; and,

2) That there do not exist in this case grounds similar to those existing in *Railroad Commission vs. Pullman Co.*, 312 U. S. 496, which would have made it appropriate for the District Court in its discretion to withhold the exercise of its equity jurisdiction.

The points of difference, therefore, between Petitioners and Respondents seem to be the first three stated above.

Petitioners ground their contention that this suit is not a case or controversy within the meaning of Article III of the Constitution of the United States upon the bases: (1) that Section 8 of Article 6049c, in providing that, "any interested person affected" by an order of the Railroad Commission, and "who may be dissatisfied therewith" may bring suit challenging the validity of such order, does not contemplate that the person bringing the suit shall show as a basis of his right to sue that he has been or will be injured by the order; (2) that in a suit under Section 8 of Article 6049c to cancel an order of the Railroad Commission granting a well drilling permit, the person to whom the permit has been granted is not a necessary party to the suit; and (3) that Section 8 of Article 6049c provides procedural rights and does not affect substantive rights of the parties.

The meaning of the words "cases" and "controversies," as used in Article III, Section 2, Clause 1, of the Constitution of the United States, has been defined by descisions of this Court, and there is no occasion for a discussion of the meaning of these

words as there employed. A question for discussion is whether or not the instant suit comes within the meaning of those words, as their meaning has been interpreted by the decisions of this Court. The bases of Petitioners' contention that this suit does not come within the meaning of those terms will be restated and discussed seriatim:

> **(1) "That Section 8 of Article 6049c, in providing that, 'any interested person affected' by an order of the Railroad Commission, and 'who may be dissatisfied therewith' may bring suit challenging the validity of such order, does not contemplate that the person bringing the suit shall show as a basis of his right to sue that he has been or will be injured by the order."**

In support of their contention that a showing of injury is not necessary to the right to sue under Section 8 of Article 6049c as an "interested person affected" by the challenged order, Petitioners rely upon *Spear vs. Humble Oil & Refining Company*, 139 S. W. (2d) 212, and *Railroad Commission vs. Shell Oil Company*, 165 S. W. (2d) 503. It is respectfully submitted that Petitioners misinterpret these opinions.

The very use in the statute of the word "affected" must be understood to refer to parties whose rights are acted upon or influenced by the challenged order, for "affected" means, "to lay hold on, to act upon, produce an effect upon, * * * to touch." *(Webster's International Dictionary.)* Petitioners in their argument do not give significance to this word or consider that the term "interested person" is used in the statute.

In *Spear vs. Humble Oil & Refining Company*, 139 S. W. (2d) 212, 216, the Court said:

> "In this connection, the majority do not sustain the remaining contention of appellant raising the question that it was necessary for appellee to allege that it would not be able during the producing life of the field and the wells on its tract to recover through such wells the amount of oil equivalent to the amount of oil beneath such tracts; nor to show injury to its private property rights sufficient to call for the intervention of the court of equity. It is the majority view that this question has been raised in numerous cases and that it has been overruled by this court; and that the Supreme Court has dismissed and refused writs of error in such cases; and deem the matter as being foreclosed by such decisions. The writer's view on the matter is set forth in the above discussion of the correlative rights of the parties."

The cases referred to by the Court in the above quoted part of the opinion, as we understand, are some of those hereinafter cited; and others hereinafter cited have been decided since the *Spear* case was decided.

In *Railroad Commission, et al., vs. Shell Oil Company, Inc., et al.*, 165 S. W. (2d) 503, 504, the Court said:

> * * * "The Shell lease abutted the 6.07 a. tract on the west, and Shell was a party to the proceeding before the Commission.

> Under repeated decisions it was an interested party, within our conservation statutes (Vernon's Ann. Civ. St. art. 6049c) and the rules of the Commission, and was entitled to maintain the suit. Empire Gas & Fuel Co. v. Railroad Comm., Tex. Civ. App., 94 S. W. 2d 1240, error refused; Railroad Comm. v. Gulf Production Co., Tex. Civ. App., 115 S. W. 2d 505, affirmed 134 Tex. 122, 132 S. W. 2d 254; Stanolind Oil & Gas Co. v. Midas Oil Co., Tex. Civ. App., 123 S. W. 2d 911 error dismissed."

The quoted statement should be read in the light of what was said in the cases cited by the Court. Following are the pertinent parts of the opinions in the cited cases.

In *Empire Gas & Fuel Company vs. Railroad Commission of Texas, et al.*, 94 S. W. (2d) 1240, 1244 (error refused), the Court said:

> "The statute (Article 6049c, Vernon's Ann. Civ. St.) does not define who are 'interested parties affected' by orders granting exceptions to rule 37, but does authorize such interested parties so affected to attack such orders by suit. Obviously such a definition, if attempted by the Legislature, would not be practicable. **Whether such exception 'affects' the interest or property rights of a leaseholder who attacks it is generally a fact question dependent upon the facts and circumstances of the particular case, and no hard and fast rule could well be laid down.*** We do not think the

*Throughout this argument the emphasis is supplied.

statute contemplated the inclusion within its terms of those only remotely interested and affected by such order; but **does include those whose lands and property rights are materially and substantially affected by such exception,** though their lands may not immediately adjoin the tract involved. Undoubtedly the well in question did substantially affect the 6 3/4 acres, the south boundary line of which was 430 feet (less than the 660 spacing distance for wells in this area) from the Gulf Production Company's lease. And the density of the drilling in the immediate area of this 6 3/4-acre tract was clearly of such consequence as to affect the Gulf's lease to the south thereof and adjacent to the 40-acre lease of the appellant out of which it was carved. The Gulf offered testimony of R. D. Parker, which was excluded, that if said well were drilled and offsets permitted, a further density of drilling would result in this area which would not only cause waste, but would materially drain oil from the Gulf's lease. Under all the facts and circumstances, therefore, we conclude that the Gulf showed such an interest in the suit as to make it a proper, if not a necessary, party, entitling it to intervene to protect its interests; and that the trial court erred in dismissing it from the suit."

In *Railroad Commission, et al., vs. Gulf Production Company*, 115 S. W. (2d) 505, 508; affirmed, *Railroad Commission, et al., vs. Gulf Production Company*, 134 Tex. 122, 132 S. W. (2d) 254, the Court said:

"The Railroad Commission also contends that appellee, Gulf Production Company, did not show itself to be 'an interested person affected by' the permit here involved, within the meaning of the amended statute, article 6049c, section 8, Vernon's Ann. Civ. St., authorizing it to attack the permit. This contention is not sustained. Of the two wells on Tippett's tract, one was 50 feet and the other 87.5 feet from the line of the Gulf's lease. Whereas, of the two wells on the Gulf lease, south of these two wells, one was 183 feet and the other 141 feet from Tippett's line thus giving Tippett a clear drainage advantage on that side of his tract. The third well granted thereon was located 87.5 feet from the Gulf's line, thus increasing the drainage from the Gulf lease. Manifestly, the Gulf was affected by such permit within the meaning of the statute."

In *Stanolind Oil & Gas Company vs. Midas Oil Company, et al.*, 123 S. W. (2d) 911, 913, (error dismissed, correct judgment), the Court said:

"That is the term (any interested party) the Legislature did use in Sec. 8 of Art. 6049c. Not only is this true, but there is a manifest difference between the subject-matter of Art. 8307 and that of Art. 6049c. In the former, the rights granted to the employee for compensation are personal to him. Whereas, under Art. 6049c, the rights involved, and subject to suit in an attack upon the Commission's order, are not personal, but **the suit so authorized is for the**

protection of the adjacent properties against drainage, confiscation, or damage, irrespective of ownership. The mere fact that the ownership of such property changes hands after the hearing before the Commission has no bearing whatever on the character, extent, or nature of the injuries, if any, which result thereto by virtue of the Commission's order. These are the matters which the Legislature intended to protect and the ownership thereof whether acquired before or after the Commission's order is made, is, we think, but incidental so long as the owner of the property affected seasonably acts under the statute. We conclude, therefore, that the District Court had jurisdiction to try these issues in the suit brought by the Stanolind Oil Company."

In *Smith County Oil & Gas Company, et al., vs. Humble Oil & Refining Company* (writ of error dismissed), 112 S. W. (2d) 220, 222, the Court said:

"The contention of the Attorney General, however, that appellee did not show itself to be an interested party affected by the permit, within the purview of section 8, art. 6049c, Vernon's Statutes, authorizing it to prosecute this suit, is not sustained. Without discussing this question at length, it is manifest we think that if a well be authorized at a lesser distance from the adjacent leaseholder's property line than is prescribed by rule 37; and that if drilled, such adjacent owner will be required to drill offset or additional wells on his own property to protect it against undue drain-

age by such additional well, it is clear that he is an interested party, and that his rights will be affected by the granting of such permit, within the purview of the statute."

In *Murphy, et al., vs. Turman Oil Company*, 97 S. W. (2d) 485, 488, the Court said:

"Nor did the fact that appellee's 30-acre tract was not immediately adjacent to the 3.2-acre tract in question preclude it from bringing this suit. Its lease did adjoin the 10-acre block out of which said 3.2 acres was voluntarily carved. The east line of said 3.2 acres was only 249 feet from the west line of appellee's land, less than the 330 feet from the property lines required by rule 37 at the time, and the evidence showed that, due to the porosity of the sand and the gas pressure in this field, drainage occurred at greater distance than this, and that appellee's lease would be affected by the additional well. Appellee was therefore an interested party within the meaning of the statute (Vernon's Ann. Civ. St. Art. 6049c), and entitled to attack said order."

In *Railroad Commission, et al., vs. Shell Oil Company, Inc., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1027, the Court said:

"The Attorney General contends that since none of those now contesting the granting of the permit in question have applied for and been refused a like special permit, we have no ground to assume that

> such a permit would be refused if requested, and, consequently, there is no evidence of discrimination against them and they are not in a position to complain. However, in our opinion, the adoption and retention of the general provisions of Rule 37 requiring all operators in the East Texas oil field to space their wells at least 660 feet apart is in itself a denial of closer spacing to every operator in the field. In addition, the Act here in question specifically provides that any interested party may contest the granting of such a permit. It has frequently been held that adjoining landowners such as the present protestants are interested within the meaning of the statute."

It is clear from what the Texas courts have said in the above quotations that the terms, "any interested person affected," and "who may be dissatisfied therewith," as those terms are used in Section 8 of Article 6049c, mean a person whose property rights will be injured by the order in question and is dissatisfied with the order. Certainly the statute, as it has been construed and applied in these decisions, means that only dissatisfied persons whose property rights are adversely affected by an order of the Railroad Commission may prosecute a suit under the statute, and that the statute gives them a right or cause of action to protect their property from actions taken under invalid orders of the Commission.

In the instant case, the testimony is abundant and uncontradicted that the drilling of a well under the challenged order and the production of oil from the

well will result in draining large quantities of oil from Respondents' property. The testimony is further undisputed that Respondents have sufficient wells on their lease to produce the recoverable oil under their lease, and that unless the well in question is drilled it would not be necessary for Respondents to drill any additional wells. The testimony is further undisputed that if the proposed well is drilled by Petitioners Hastings and Dodson and oil is produced from it, the cost to Respondents of an offset well would be some ten or twelve thousand dollars; and, that while such offset would reduce the drainage of Respondents' lease by operation of the proposed well on the lease of Petitioners Hastings and Dodson, it would not prevent drainage. (R., 92-93.)

(2) "That in a suit under Section 8 of Article 6049c to cancel an order of the Railroad Commission granting a well drilling permit, the person to whom the permit has been granted is not a necessary party to the suit."

In considering the question as to whether or not the holder of a permit granted by the Railroad Commission to drill a well in exception to Rule 37 is a necessary party to a suit under Section 8 of Article 6049c challenging the validity of such order, this Court should consider the nature of the case relied upon by Petitioners to establish their proposition that the holder of the permit is not a necessary party. *Magnolia Petroleum Companay, et al., vs. Edgar*, 62 S. W. (2d) 359, relied upon in this case on this point by Petitioners, was a suit brought by the Magnolia Petroleum Company to enjoin Edgar from drilling

an oil well. There had been an agreement between Edgar and Magnolia Petroleum Company concerning the number of wells that they would drill on their respective and adjoining tracts. Edgar assigned a part of his lease to Riggs, with the understanding that the assignment would be held in escrow pending the securing of a permit from the Railroad Commission to drill a well on the assigned portion of the Edgar tract. The Railroad Commission refused a permit. A suit was filed attacking this order of the Commission, and in the district court judgment was entered authorizing the drilling of the well. The Railroad Commission was made a party defendant to this lawsuit, but none of the adjoining leaseowners were made parties defendant or given notice of the suit. Final judgment was entered by the district court in that case without the knowledge of Magnolia Petroleum Company. Magnolia Petroleum Company then brought suit against Edgar to enjoin the drilling of the well authorized by the court decree, urging, among other contentions, that the judgment of the district court authorizing the drilling of the well was void upon its face and not binding upon Magnolia Petroleum Company because it was a necessary party to the suit. In that case the court held that the Railroad Commission was the only necessary party to the suit challenging the Commission order, but that was a suit attacking an order of the Commission refusing the applicant a permit to drill. The instant suit challenges an order of the Railroad Commission granting Hastings and Dodson a permit to drill. Hastings and Dodson have a permit to drill a well, and if

the permit is valid they have a property right in the permit. Respondents contend that the order granting the permit is invalid and that operation of the well under the permit and the production of oil from it will injure Respondents. Respondents therefore sue, attacking the validity of the permit, and seeking an injunction restraining any drilling operations under the permit or production of oil from any well drilled under the permit. (R., 11.)

The suit involves the property rights of Hastings and Dodson, and asks an injunction against them. Petitioners overlook this feature of the case. Ordinarily, all persons against whom an injunction must run in order to make it effective, or whose property rights will be affected by the relief asked, are necessary parties to the suit. (*Abrahams vs. Vollbaum*, 54 Tex. 226; *City of Dallas vs. Couchman*, 249 S. W. 234; *Holt & Co. vs. Wheeler County*, 235 S. W. 226; *Basham vs. Holcombe*, 240 S. W. 691; *Matagorda Canal Company vs. Markham Irr. Co.*, 154 S. W. 1176; *Dwyer vs. Hackworth*, 57 Tex. 245.) The rule is fundamental in equity jurisprudence.

Other cases bearing upon who are necessary parties to a suit to set aside an order of the Railroad Commission granting some right or privilege to another are: *Railroad Commission of Texas, et al., vs. Rau*, 45 S. W. (2d) 413, 416; *North Texas Coach Company vs. Morten*, 92 S. W. (2d) 263, 265; *Turman Oil Company vs. Roberts, et al.*, 96 S. W. (2d) 724, 726; *Reynolds, et al., vs. Ward Oil Corp., et al.*, 157 S. W. (2d) 457.

(3) "That Section 8 of Article 6049c provides procedural rights and does not affect substantive rights of the parties."

Petitioners contend that the statute provides a procedure and that it does not create any "new substantive right." This contention Respondents believe to be contrary to the sense of cases decided under the statute.

Sections 8, 10 and 11 of Article 6049c (quoted in the appendix to Petitioners' argument) are clearly separable provisions of the Act of which they are a part. Section 8 provides that "any interested person affected" by Railroad Commission orders, and who is "dissatisfied" with them, "shall have the right to file a suit in a court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission or the members thereof, as defendants "*to test the validity*" of any such order. Section 10 imposes limitations upon the granting of injunctions and temporary restraining orders by the Texas Courts. Section 11 contains provisions relating to appeals.

In *Alpha Petroleum Company vs. Terrell*, 122 Tex. 257, 59 S. W. (2d) 364, 367, the Court, with citation to cases involving other statutes, treated Section 8 as giving a right of attack which is not based on the common law or constitutional jurisdiction.

In *Railroad Commission vs. H. & T. C. R. Co.*, 90 Tex. 340, 38 S. W. 750, involving the Act of 1891, referred to in "Argument for Respondents on Re-Argument of the Cause" (appendix, p 28), the Attorney General contended that the Act of 1891 only contemplated that the rules of the Commission could be set aside by the courts when such rules amounted

to the taking of property without compensation or without due process of law. The court discussed this question at length, and demonstrated "that the purpose and intention of the statute mentioned were to confer on the court a statutory power or jurisdiction to review the orders, rules, etc., of the Commission that did not exist under the Constitution, and did not exist absent the statute." *(Alpha Petroleum Co. vs. Terrell*, 122 Tex 257, 59 S. W. (2d) 364, 369.)

In the *Alpha* case, in discussing the proper construction of Article 6049c, Section 8, the Court made the quoted statement concerning the opinion in the *H. & T. C. R. Co.* case. If the statute gives the court a power to review the orders of the Commission and hold them invalid, on grounds "that did not exist under the Constitution and did not exist absent the statute," then obviously the statute affects the substantive rights of the parties and is not purely procedural in nature.

In granting or refusing a permit to drill a well in exception to Rule 37, the Railroad Commission exercised *quasi-judicial* powers. *(Gulf Land Company vs. Atlantic Refining Company*, 134 Tex. 59, 131 S. W. (2d) 73, 81; *Magnolia Petroleum Company, et al., vs. Railroad Commission, et al.*, 128 Tex. 189, 96 S. W. (2d) 273, 275.) In a suit challenging the validity of such an order, where it has been granted, as here, "to prevent, confiscation of property," the court is to determine whether or not there existed, at the time the Commission order was entered, sufficient facts to support the order. *(Railroad Commission, et al., vs. Shell Oil Company, Inc., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030.) Such is the

issue under the statute, as it has been construed by the Supreme Court of Texas. The question to be litigated is purely judicial in character. The right to have the order invalidated because of the absence of facts sufficient to justify it, calls upon the court to find what the facts were, and the right is one which the plaintiff in suit may urge because of the statute, and which he could not urge except for the statute.

Gulf Land Co., et al., vs. Atlantic Refining Co., et al., 134 Tex. 59, 131 S. W. (2d) 73, 82-83, and *Railroad Commission, et al., vs. Shell Oil Company, Inc., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1028-1030, and the results of those cases, can only be interpreted as treating and construing the statute to grant to the complaining interested party a right to attack the administrative orders of the Commission on bases that do not exist under the Constitution and only exist by reason of the statute.

If the statute creates a right and is not purely procedural, then it does not confine the jurisdiction of cases brought under it to the State Courts, for reasons pointed out on pages 12 to 22 of the "Argument for Respondents on Re-Argument of the Cause."

IN VIEW OF RECENT DECISIONS OF THE TEXAS COURTS, ARE THERE GROUNDS IN THIS CASE SIMILAR TO THOSE EXISTING IN RAILROAD COMMISSION VS. ROWAN & NICHOLS OIL COMPANY, 311 U. S. 614, 615 WHICH MAKE IT APPROPRIATE FOR THE DISTRICT COURT TO DECLINE JURISDICTION OF THE CAUSE?

In contending that this question should be answered in the affirmative, Petitioners are apparently

in conflict with their position that there are not present in this case grounds similar to those existing in *Railroad Commission vs. Pullman Company*, 312 U. S. 496, which would have made it appropriate for the District Court to withhold the exercise of its equity jurisdiction in this case. In connection with the last mentioned question, Petitioners state as follows:

> * * * "If our understanding is correct, the primary basis for the decision in the *Pullman* case is not present in these cases; because the State statute here involved has been construed many times by the State Courts."

Then, in taking the position that grounds similar to those existing in *Railroad Commission vs. Rowan & Nichols Oil Company*, 311 U. S. 614, 615, exist in this case, Petitioners say:

> * * * "We, therefore, submit that it may be said with equal support in the Texas decisions now as at the time of the *Rowan & Nichols* cases were decided (1) that the Texas decisions do not make clear whether the local courts may exercise an independent judgment of what is reasonable, but (2) apparently, according to the Texas cases the standard of reasonableness under the Texas law is substantially the same as the standard of reasonableness used by this Court in testing the validity of an administrative order under the Due Process Clause (with the exception which we have already pointed out, that under the special

> Texas statutory appeal, the complaining party does not have to show actual injury to his property interests)."

As Respondents interpret the argument, Petitioners say under one point that the statute involved in this case has been construed many times, and in argument under the other point that the decisions do not make clear "whether the local courts may exercise an independent judgment on what is reasonable." The question in this case is not "what is reasonable," but were the facts existing at the time the order was entered sufficient to justify the Commission action.

It seems to Respondents that the statement of the Supreme Court in *Railroad Commission, et al., vs. Shell Oil Company, Inc., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030, makes crystal clear what the Court is to determine in this case in testing the validity of a permit to drill a well, granted "to prevent confiscation of property." There the Court said:

> * * * "In Texas, in all trials contesting the validity of an order, rule or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether, at the time such order was entered by the agency there then existed sufficient facts to justify the same."

The Court is not to substitute its discretion for that committed to the Commission. But, "If the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, then the order must be set aside."

There is no uncertainty in these quoted portions from the opinion of the Supreme Court in the *Shell* case. Did the evidence before the Court in the instant case show that the property of Petitioners Hastings and Dodson was not being confiscated? The right to assert that facts existing at the time the challenged order was entered were not sufficient to support a finding that Petitioners' property was being confiscated exists by reason of the statute. Will the order have the effect to deprive Respondents of their property without due process of law? The right to inquire into this question exists under the Constitution. Those are judicial questions to be tried by the Court in this case, and the extent of the review in such a case and the issues are clearly defined by the construction which the Supreme Court of Texas has placed upon the statute giving the interested party the right to review in a judicial proceeding the orders of the Railroad Commission granting permits in exception to the general spacing rule.

WHEREFORE, Respondents submit that the order and judgment of the Circuit Court of Appeals should be affirmed.

E. R. HASTINGS,
Tulsa, Oklahoma,

DAN MOODY,
Austin, Texas,
Attorneys for Respondents.

Copies of this Argument have been furnished to Messrs. Gerald C. Mann, Attorney General of Texas, E. R. Simmons and Jas. D. Smullen, Assistants Attorney General of Texas, Austin, Texas, and Messrs. W. Edw. Lee, Tyler, Texas, and John Porter, Longview, Texas, attorneys for Petitioners.